No. 82-1608

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,
Petitioner,

vs.

ESTHER WUNNICKE
~~ROBERT LEROSCHE~~, COMMISSIONER OF DEPARTMENT OF NATURAL RESOURCES OF THE STATE OF ALASKA, et al.,
Respondents,

KENAI LUMBER CO., INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Assuming the Commerce Clause applies to a state decision to sell state-owned timber subject to a requirement that the purchaser process the timber in state before export, must Congress pass a statute specifically authorizing the state to do so, or, can congressional consent be implied from federal statutes and regulations which impose the same processing requirement on federal timber sales in the state?

2. When a state sells state-owned timber subject to a requirement that the purchaser process the timber in state before export, is the state acting as a market participant, rather than a market regulator, so as to be exempt from Commerce Clause scrutiny?

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Respondents, Robert LeResche, Commissioner of Department of Natural Resources of the State of Alaska, and other officials of the State of Alaska, ("state respondents") oppose the petition for a writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit filed by Petitioner South-Central Timber Development, Inc. ("South-Central").

OPINIONS BELOW

The opinion of the court of appeals is reported at 693 F.2d 890 (9th Cir. 1982). The opinion of the district court is reported at 511 F. Supp. 139 (D. Alaska 1981).

JURISDICTION

The state respondents accept the petitioner's statement of jurisdiction.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

1. The Commerce Clause of the United States Constitution, Art. I, Sec. 8, Cl. 3.
2. The Organic Administration Act of June 4, 1897, 16 U.S.C. §§ 475, 476.
3. Act of April 12, 1926, 16 U.S.C. §§ 616-617.
4. 36 C.F.R. § 223.10 (1981); 43 C.F.R. § 5400.0-3(c),-5 (1981).
5. Alaska Stat. § 38.05.115.
6. 11 Alaska Administrative Code §§ 71.230, 71.910(11) (1982).

STATEMENT OF THE CASE

The Commissioner of the Department of Natural Resources of Alaska is given discretion under state law to set the terms and conditions for state timber sales, and is specifically authorized to condition sale of state-owned timber on primary manufacture in Alaska.[1] In 1980 the Commissioner gave notice of a proposed sale of state-owned timber at Icy Cape on Prince William Sound in Southcentral Alaska and announced that Alaska

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[1]Alaska Stat. § 38.05.115; 11 A.A.C. § 71.230 (1982).

would require primary manufacture within the state as a special provision of the contract.[2]

The Commissioner decided to require primary manufacture as a term of the proposed Icy Cape timber sale because the requirement was necessary to assure a continuing supply of timber for existing timber mills in Southeast and Southcentral Alaska during a temporary shortage of timber from federal lands. E.R. 121-122.

The primary manufacture requirement included in the proposed state timber sale applies only to the purchaser of that timber sale. The requirement does not affect timber which is not owned and sold by the State of Alaska. Timber harvested in Alaska from privately-owned land is not affected by the State's primary manufacture requirement for its own timber sales and may be sold under whatever terms are agreeable to the buyer and seller.

Alaska's primary manufacture requirement for state timber sales is virtually identical to the long-standing processing requirement for federal timber sales in Alaska. In fact, Alaska's primary manufacture requirement is a continuation of federal timber policy that pre-existed

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[2]The primary manufacture contract term requires the purchaser to perform initial processing of harvested logs in Alaska prior to export. Primary manufacture, as defined by the proposed contract terms and regulations of the Alaska Department of Natural Resources, is accomplished by either squaring good quality saw logs into cants by cutting four slices along the length of the log, or processing poor quality logs into chips. Excerpt of record ("ER") at 6-7, 23; 11 A.A.C. § 71.910(11) (1982). The primary manufacture contract requirement is satisfied when the purchaser processes the harvested logs into cants or chips. Cants or chips may be exported for further processing or may be further processed or sold within the state.

Alaska Statehood. Since 1928 the Forest Service has limited the export of unprocessed logs from national forests in Alaska under authority granted by the Organic Administrative Act of June 4, 1897 (16 U.S.C. §§ 475, 476) and the Act of April 12, 1926 (16 U.S.C. § 616).

In 1928 the Secretary of Agriculture promulgated regulations which prohibit the export of unprocessed logs from national forest lands in Alaska without approval of the Regional Forester. The regulations have remained in effect in substantially the same form.[3] The purpose of the federal processing requirement is to promote the development of an adequate wood processing industry in Alaska.

In 1969 Congress set a quota on the unprocessed timber that could be exported from federal lands west of the one-hundredth meridian (a line running south from the mid-

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[3]The current forest service regulations for Alaska, found at 36 C.F.R. § 223.10(c) (1981), state:

> Unprocessed timber from National Forest System lands in Alaska may not be exported from the United States or shipped to other States without prior approval of the Regional Forester. *This requirement is necessary to ensure the development and continued existence of adequate wood processing capacity in that State for the sustained utilization of timber from the National Forests which are geographically isolated from other processing facilities.* In determining whether consent will be given for the export of timber, consideration will be given to, among other things, whether such export will (1) permit more complete utilization on areas being logged primarily for local manufacture, (2) prevent loss or serious deterioration of logs unsaleable locally because of an unforeseen loss of market, (3) permit the salvage of timber damaged by wind, insects, fire, or other catastrophe, (4) bring into use a minor species of little importance to local industrial development, or (5) provide material required to meet urgent and unusual needs of the Nation. (Emphasis added.)

point of the North Dakota—Canadian boundary, through central Texas). (16 U.S.C. § 617). In 1973 Congress strengthened its policy by imposing a complete ban on the export of unprocessed timber from such lands through a series of annual riders to appropriation acts.[4]

Petitioner South-Central Timber Development, Inc. is an Alaska corporation engaged in purchasing standing timber, harvesting and processing the timber for sale. South-Central was operating in Alaska under an earlier state timber sale contract which did not require local processing, and exporting most of the logs to Japan. South-Central did not have a working mill in Alaska. When it learned of the primary manufacture requirement for the proposed Icy Cape timber sale, South-Central brought this action for injunctive relief against various state officials. South-Central claimed it was prevented from bidding on the Icy Cape sale by the added expense of in-state processing. The District Court granted a temporary restraining order and the State agreed to postpone the sale until final decision on the merits. Upon cross-motions for summary judgment, the district court granted summary judgment to South-Central, concluding that the primary manufacture timber sale requirement was not exempt from Commerce Clause scrutiny and that it constituted an unreasonable burden on interstate commerce.

On appeal the Ninth Circuit Court of Appeals reversed. The court of appeals concluded that, even assuming the

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[4]See e.g., P.L. 96-126 § 301, 93 Stat. 979, which was in effect when this action was filed. The Forest Service regulations which prohibit the export of unprocessed timber from National Forest lands are found at 36 C.F.R. § 223.10 (1981). The Bureau of Land Management regulations are set forth at 43 C.F.R. § 5400.0-3(c), -5 (1981).

Commerce Clause does apply, Congress has consented to the State's primary manufacture requirement. The court of appeals found implicit congressional approval of the Alaska primary manufacture requirement from federal statutes and regulations which impose identical processing requirements on timber from federal lands in Alaska and the western states. The court of appeals did not decide whether Alaska is acting as a market participant in requiring primary manufacture as a condition of state timber sales and is, therefore, exempt from Commerce Clause scrutiny.

REASONS FOR DENYING THE WRIT

Summary of Argument

The court of appeals correctly decided that the Commerce Clause does not prohibit Alaska from conditioning the sale of state-owned timber on primary processing in Alaska. Finding implicit congressional consent to Alaska's primary manufacture requirement on the facts of this case is consistent with prior decisions of this Court.

Furthermore, the decision below is correct without regard to the issue of implied congressional consent. In requiring primary manufacture as a term of a contract for the sale of state-owned timber, the State of Alaska is directly participating in the market as a seller, rather than regulating the timber market. Therefore, Alaska's primary manufacture requirement is exempt from Commerce Clause scrutiny under recent decisions of this Court.

This case has no significant impact on foreign commerce. The potential impact of this case as precedent is very

limited due to the particular facts upon which the court of appeals found implied consent.

1. The court of appeals decision does not conflict with, and is supported by, decisions of this Court.

The court of appeals decision that Congress has implicitly approved of the Alaska primary manufacture requirement is not, as petitioner asserts, in direct conflict with decisions of this Court. To the contrary, the decision below is consistent with decisions of this Court finding congressional consent to state action challenged under the Commerce Clause where the state has followed a specific federal policy authorized by Congress for the affected commerce.

In this case, Congress has affirmatively approved of the policy of restricting export of unprocessed timber from Alaska to promote development of the wood processing industry in Alaska. As the court of appeals recognized, Alaska is merely adhering to federal policy that preexisted statehood in requiring primary manufacture for state timber sales. Alaska's primary manufacture requirements duplicate the processing requirements imposed on federal timber and serve the same objective. 693 F.2d at 893.

In three cases cited by petitioner, *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982), *Sporhase v. Nebraska*, 102 S.Ct. 3456 (1982), and *Lewis v. B.T. Investment Managers Inc.*, 447 U.S. 27 (1980), this Court rejected arguments that Congress had impliedly consented to state action that would otherwise violate the Commerce Clause. However, none of those cases involve the situation pre-

sented in the instant case where Congress has expressly approved of a specific federal policy for the affected commerce and the state has adopted a consistent and parallel policy.

The question in *New England Power* was whether Congress had authorized New Hampshire to prohibit the exportation of hydroelectric power produced in that state. New Hampshire claimed that the Federal Power Act authorized it to prohibit the export of locally produced hydroelectric power. However, the relevant provision in the Federal Power Act said nothing about prohibiting the export of hydroelectric power. It merely stated that the Act was not intended to deprive a state of any lawful authority it exercised over the exportation of hydroelectric energy. 331 U.S. at 341. Congress had not approved in any way of the policy adopted by New Hamphire of prohibiting the export of hydroelectric power in order to protect local consumers.

At issue in *Sporhase v. Nebraska* was a Nebraska statute which restricted the export of ground water by conditioning export on reciprocity by the receiving state. Nebraska argued that Congress had impliedly consented to its restriction of ground water export in numerous federal statutes that generally indicated Congress' deference to state water law. 102 S. Ct. at 3466. None of those statutes said anything about the policy of restricting ground water export to protect in-state consumers.

Lewis v. B.T. Investment Managers was a Commerce Clause challenge to a Florida statute which prohibited out-of-state banks and holding companies from owning Florida investment subsidiaries. This Court rejected

Florida's arguments that the Federal Bank Holding Company Act authorized the Florida restriction because neither the policy nor effect of the Florida ban on interstate commerce had been approved by Congress in that statute. 447 U.S. at 47-49.

The Court's recent decision in *White v. Massachusetts Council of Construction Employers, Inc.*, 51 U.S.L.W. 4211 (U.S. Feb. 28, 1983), cited by petitioner, supports the court of appeals decision in the instant case. *White* was a Commerce Clause challenge to a Boston executive order requiring all construction projects funded in whole or in part by city funds to be performed by a work force at least half of which were bona fide residents of the city. The Court held that insofar as the Boston local hire order applied to projects financed in part by federal funds, the city was acting as a market regulator but there was no Commerce Clause violation because federal regulations affirmatively permitted the type of parochial favoritism involved in the Boston local hire order.

In *White* this Court concluded that Congress had approved of the Boston local hire order even though there was no federal statute expressly stating that cities are authorized to require local hire on projects financed in part by the city and in part by federal funds. The applicable federal statutes merely stated that the federally funded programs were intended to encourage economic revitalization, including improved opportunities for the poor, minorities, and unemployed. 51 U.S.L.W. at 4213. From these general congressional statements of policy for the expenditure of federal funds on redevelopment projects, this Court concluded that Congress had affirmatively

approved the challenged local hire practice of the City of Boston. The Ninth Circuit applied a very similar analysis in reaching its decision in the instant case.[5]

To summarize, the court of appeals decision in this case is fully consistent with and supported by the Court's decision in *White*. This case is distinguishable from cases cited by petitioner in which the Court has rejected arguments of implied congressional consent to state action that would otherwise violate the Commerce Clause because in those cases there was no congressionally approved federal policy similar or identical to the state policy being challenged as violative of the Commerce Clause.

2. The Commerce Clause does not even apply because Alaska is directly participating in the market as a seller of timber rather than regulating private trade in timber.

The decision below that Alaska's primary manufacture requirement does not violate the Commerce Clause is correct without regard to the issue of implied congressional consent to the primary manufacture requirement.

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[5]Although the court of appeals did not cite it as precedent, *Parker v. Brown*, 317 U.S. 341 (1943), also supports the decision in this case. *Parker v. Brown* was a challenge on anti-trust and Commerce Clause grounds to a raisin marketing program enacted by the State of California. The California program required each grower to deliver over two-thirds of his raisin crop to a committee which then exercised marketing control over raisins so as to eliminate competition between producers and maintain a viable price for the raisin crops. The Court sustained the California regulation against the Commerce Clause challenge on the ground that the state regulation was consistent with the general policy that Congress had established for stabilizing the marketing of agricultural commodities, although Congress had not expressly approved California's program. *Id.* at 359-368.

Recent decisions of this Court make clear that when a state or local government enters the market as a participant it is not subject to the restraints of the Commerce Clause. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); *White v. Massachusetts Council of Construction Employers, Inc.*, 51 U.S.L.W. 4211 (U.S. Feb. 28, 1983). Although the court of appeals did not reach this issue, it is clear that Alaska's action in the instant case constitutes direct participation in the market, rather than regulation of private trade in the timber market.

In *Hughes v. Alexandria Scrap Corp.*, the Court first announced the principle that state participation in a market is not the type of state activity prohibited by the Commerce Clause:

> Nothing in the purposes animating the Commerce Clause forbids a state, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others.

426 U.S. at 810. The Court affirmed this holding in *Reeves v. Stake*, 447 U.S. at 436-440, and most recently, in *White v. Massachusetts Council of Construction Employers*, 51 U.S.L.W. at 4212.

Reeves was a Commerce Clause challenge to action by the State of South Dakota as a seller of cement. South Dakota restricted the sale of state-owned cement to residents of South Dakota, cutting off an out-of-state distributor who had previously purchased the cement produced by South Dakota. Recognizing that South Dakota, as a seller of cement, was acting as a market participant rather than as a regulator of private trade in cement, the

Court held that South Dakota's resident-preference policy for the state sale of cement did not violate the Commerce Clause.

The instant case is similar to *Reeves* in every significant respect. In this case Alaska, like South Dakota in *Reeves*, has adopted the challenged requirement as a condition of the sale of property actually owned by the state. Like the state-owned cement in *Reeves*, the state-owned timber in this case represents an investment of tax dollars. Just as South Dakota invested state revenues in producing cement, Alaska has expended state revenues to manage the commercial timber land it owns and to plan and supervise the harvest and sale of the timber.*

In this case, as in *Reeves*, the challenged state sale restriction applies only to the immediate party with whom the state is transacting business. South Dakota restricted its cement sales to state residents. Alaska restricts its major timber sales to purchasers who will agree to perform primary processing of the timber in Alaska before export. Alaska's primary manufacture requirement is a term of the timber sale contract, binding only on the purchaser of the state timber sale. After the purchaser performs primary manufacture in accordance with the con-

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*The state-owned timber land at Icy Cape which is directly involved in the instant case was patented to the State under the land grant provisions of the Alaska Statehood Act, P.L. 85-508, § 6, 72 Stat. 339 (1958). However, petitioner's argument that the Commerce Clause prohibits Alaska from selling state-owned timber subject to a primary processing requirement, would apply equally to state-owned timber on land that the State purchased. The cost of purchasing the commercial timber land would be an added substantial investment of state tax dollars.

tract terms, the purchaser is free to export and sell the timber without restriction. The primary manufacture requirement does not apply to any resales or downstream transactions.[7]

Finally, in this case, as in *Reeves*, there is no attempt to hoard natural resources found within the state. By requiring primary manufacture as a term of a state timber sale, Alaska is not affecting access by out-of-state industry or consumers to timber harvested from federal or private land in Alaska. The State of Alaska, as only one of many owners of commercial timber land in Alaska, possesses no unique access to timber.

In *White v. Massachusetts Council of Construction Employers*, the Court held that the City of Boston was acting as a market participant, not subject to Commerce Clause restrictions, when it required that all construction projects funded in whole by city funds be performed by a work force consisting of at least half Boston residents. The Court rejected the argument that the Boston local hire requirement went beyond participation in the market be-

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[7]Petitioner South-Central and Amici Pacific Rim Trade Association, et al., assert that the primary manufacture requirement applies after the initial sale and restricts the disposition of privately owned logs to third parties. This argument is based on a technicality of the timber sale contract which provides that the purchaser must pay for the logs after the timber is cut and scaled but before primary manufacture is performed. The timing of the payment under the contract does not alter the fact that primary manufacture is a term of the initial sale contract, binding only on the purchaser who directly contracts with the state. Moreover, primary manufacture is an integral term of the initial timber sale contract because the price that the purchaser pays for the logs is reduced to reflect the cost to the purchaser of processing the timber.

cause it reached beyond the immediate parties employed by the city and regulated contracts between public contractors and their subcontractors. 51 U.S.L.W at 4213, n. 7.

Alaska's primary manufacture requirement is an even clearer situation of direct state participation in the market than was the local hire order sustained by the Court in *White*. Alaska's role in this case is that of a seller of timber, pure and simple. In offering state-owned timber for sale on the condition that the purchaser performs primary manufacture, Alaska is not regulating contracts for the resale of the timber or regulating the buying and selling of privately-owned timber. The primary manufacture requirement, unlike the local hire order in *White*, stops at the boundary of formal privity of contract.

Since Alaska's role is clearly that of a direct market participant, Alaska's primary manufacture requirement for state timber sales is not subject to the restraints of the Commerce Clause.

3. This case does not significantly impact foreign commerce in timber or other resources.

This Court should not be persuaded to grant the writ on the basis of petitioner's and amicis' claims that this case significantly impacts foreign commerce and will encourage states to enact export restrictions on natural resources other than timber. These claims lack substance.

There is no basis in the record for concluding that Alaska's primary manufacture requirement has any substantial impact on foreign or interstate commerce. When Alaska chooses to include a primary manufacture requirement in a contract for the sale of state timber, the require-

ment applies only to the timber involved in that sale. It does not affect timber entering foreign commerce from federal or privately-owned land in Alaska.[8]

Alaska's primary manufacture requirement impacts foreign trade in timber only to the extent that Alaska chooses to sell state-owned timber and chooses to apply a primary manufacture requirement to the sale. The same impact on foreign commerce (the unavailability for export of unprocessed logs from state-owned lands) would occur if the state chose not to sell state-owned timber. The State could, for example, decide to harvest and process state-owned timber itself for use within the State. Alternatively, the State could decide to sell state-owned timber only to persons who have operating lumber mills in Alaska.[9] None of these alternatives would violate the Commerce Clause yet the impact on foreign export of unprocessed logs from state-owned lands would be the same.

Furthermore, the impact of Alaska's primary manufacture requirement on foreign commerce is significantly less than the impact of the congressionally approved federal

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[8]While it is true that Alaska's primary manufacture requirement has a substantial impact on trade in timber originating from state timber sales, the relevant question is whether the state action substantially affects or burdens the national or international timber market, not just that small part of commerce created by the State's decision to sell state-owned timber. See *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 809, n. 18 (1976) (the Commerce Clause does not forbid state action reducing or eliminating commerce created by the State's market participation).

[9]Alaska Stat. § 38.05.118 (Supp. 1982) authorizes the Commissioner of the Department of Natural Resources to negotiate a sale of timber to a local manufacturer when there is a high level of local unemployment within the area serviced by the local manufacturer.

processing requirements for timber from federal land because the federal government owns the great majority of the commercial timber land in Alaska.[10]

Moreover, it is significant that the federal policy of requiring primary manufacture for federal timber has been effective in Alaska since 1928 and Alaska's policy of requiring primary manufacture as a condition of major state timber sales has been followed since 1959 when Alaska became a state. In short, the effect of the decision below is to maintain the status quo that has existed since 1928 with respect to restrictions on the export of unprocessed timber from Alaska. The court of appeals decision does not result in any new or additional restrictions on foreign export of timber products from Alaska.

Finally, petitioner argues that the impact of the Ninth Circuit decision is not limited to the timber industry but will encourage states to adopt similar restrictions with respect to other natural resources. The decision below does not, as petitioner implies, have broad precedential impact and could not reasonably justify or encourage other states to adopt regulations restricting the export of other natural resources. As precedent the decision below is limited to similar facts, situations in which a state is selling a state-owned resource subject to the same terms of sale that the

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[10]Appendix H to petitioner's brief, at pages 52A through 54A, shows that out of a total of approximately 11½ million acres of commercial timber land in Alaska, the federal government owns approximately 8½ million acres, the State of Alaska owns approximately 2½ million acres and private parties own less than half a million acres. The same statistics indicate that other western states which own commercial timber land own significantly less commercial timber land than do private parties and the federal government.

federal government requires by law for federal sales of that resource. This is a rather unique set of facts and it seems unlikely that any parallel or substantially similar situation exists.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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